circumstances, the seller must not include in the distribution non-contract customers, or new contracts taken after the contingency occurred. See cases above cited. For an apparent exception in favor of regular customers, which on principle seems open to doubt, *cf. Oakman v. Boyce* (1868) 100 Mass. 477; *Metropolitan Coal Co. v. Billings* (1909) 202 Mass. 457. The principal case seems an unfortunate departure from a just and reasonable rule.

CONTRACTS—RESTRAINT OF TRADE—VALIDITY OF RESTRICTIONS ON RESALE PRICE.—The plaintiff sought an injunction to prevent the defendant from selling Ingersoll watches at prices below those specified in a notice attached to each watch. The plaintiff manufactured the watches in New York and sold them, subject to the price restrictions, to jobbers in New Jersey, from whom the defendant acquired them. The defendant moved to dismiss the bill. *Held,* that the bill was sufficient. *Robt. H. Ingersoll & Bro. v. Hahne & Co.* (1917, N. J. Ch.) 101 Atl. 1030.

See COMMENTS, p. 397.

CRIMINAL LAW—ASSAULT—DISEASE COMMUNICATED BY HUSBAND TO WIFE.—The defendant, knowing himself to be afflicted with a venereal disease, had sexual relations with his wife without informing her of his condition. She contracted the disease. *Held,* that the defendant was guilty of an assault. *State v. Lankford* (1917, Del. Gen. Sess.) 102 Atl. 63.

The marital relation confers upon the husband a privilege of intercourse, but whether this privilege permits a husband knowingly to infect his wife without incurring criminal liability is in dispute. The leading English case holds that it does. *Regina v. Clarence* (1888) 16 Cox C. C. 511. But Hawkins, J., dissenting, said that though a simple act of communion is lawful, one combined with contagion is not, there being no consent to the injection of poison. This raises the much disputed question of what is meant by consent. American courts have held that the administering of poison in food constitutes an assault, on the ground that there is no consent to the taking of poison. *Commonwealth v. Stratton* (1873) 114 Mass. 303 (Spanish fly in figs); *Johnson v. State* (1893) 92 Ga. 37, 17 S. E. 974 (arsenic solution in coffee). The English cases are *contra. Regina v. Walkden* (1845) 1 Cox C. C. 282 (Spanish fly in ale); *Regina v. Hanson* (1849) 2 C. & K. 912 (Spanish fly in liquor). Intercourse secured by impersonation is, because of the consent, at most an assault and not rape. *Regina v. Saunders* (1838) 8 C. & P. 265; *Regina v. Williams* (1838) 8 C. & P. 286; but see *Regina v. Dee* (1884) 15 Cox C. C. 579, and section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict., C. 69). "Consent" to sexual intercourse induced by advice that it is a surgical operation is no consent. *Regina v. Flattery* (1877) L. R. 2 Q. B. D. 410. Consent is a form of intent, the consenting party intending to undergo certain consequences. See Prof. Walter W. Cook, *Act, Intention and Motive* (1917) 26 YALE LAW JOURNAL 645. If the husband's marital privilege cannot be exercised without producing other consequences not intended by the wife, *i. e.,* not consented to, the exercise of the privilege must be foregone or a criminal liability will be incurred. No other American authority on the precise point has been found.

CRIMINAL LAW—LARCENY—DIVERSION OF WATER FROM CITY MAINS.—The defendant had surreptitiously diverted water around a meter located on his land so as to prevent registration of the total amount used. In a prosecution

for larceny the defendant contended that the city which supplied the water had merely the privilege of taking the water from its natural courses and charging for its distribution and that the water had not assumed such character as personal property as to become the subject of larceny; and also that possession and ownership of the water had been surrendered to the defendant when the water came on his land and before it reached the point of diversion. *Held,* that the defendant was guilty of larceny of the property of the city. *Clark v. State* (1917, Okla.) 167 Pac. 1156.

On the question when possession passes to a customer supplied with an article by means of pipes the decision is supported by cases involving larceny of gas. See *Woods v. People* (1906) 222 Ill. 293, 78 N. E. 607, 5 L. R. A. (N. S.) 560, 6 A. & E. Ann. Cas. 736, and cases there collected. But with respect to ownership by the company or municipality furnishing the supply, the case of water presents theoretical questions which do not arise in the case of a manufactured or mineral product like gas. Water flowing in its natural course is not itself the subject of property, either as realty or as personalty, the rights and privileges of the public or of the owner of the soil underneath or of riparian owners being merely rights and privileges of appropriation and user. *Race v. Ward* (1855, Q. B.) 4 E. & B. 702; *Brown v. Cunningham* (1891) 82 Ia. 512, 48 N. W. 1042. But when lawfully appropriated and reduced to possession in a cistern or other artificial container by any person for his own private use there seems no doubt that it becomes personal property. See *Race v. Ward, supra.* Just what constitutes sufficient appropriation and possession is a question not fully answered by the few authorities found. It is clear that ice cut and stored is properly held a subject of larceny. *Ward v. People* (1843, N. Y. Ct. Err.) 6 Hill 144. And it has been held that one who lawfully enters on the surface of the ice in a public river, stakes off a portion, prepares it for cutting, and continually guards and protects it, has sufficient possession to maintain an action for conversion. *Hickey v. Hazard* (1877) 3 Mo. App. 480; see also *Brown v. Cunningham, supra.* In an English case, which seems to be the decision nearest to the principal case, one drawing water without right from a pipe was held guilty of larceny, but the case is distinguishable in that there the water was, when stolen, in the pipes of and under the control of a purchaser from the water company. *Ferens v. O'Brien* (1883) 11 Q. B. D. 21. Purely as a matter of legal theory it would seem that the question whether a municipality, in a case like the principal case, acquires a property right in the water in its distribution system, or merely the right to divert and conduct the water to the consumer, might be answered either way. The actual decision was no doubt influenced by the court's lack of sympathy with what seemed a highly technical defense, and the absence of any criminal statute to reach the case, if the elements of larceny were found wanting. The result will commend itself to the practical man and it avoids the necessity of special legislation such as has been found necessary in some states to reach the case of "stealing" electricity. See 6 A. & E. Ann. Cas. 739, note.

CRIMINAL LAW—SPECIFIC INTENT—ASSAULT UPON MISTAKEN PERSON.—A statute declared it an offense to make "an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury," without provocation or "where the circumstances of the assault show an abandoned or malignant heart." The information charged the defendant with an assault with a revolver upon S with intent to injure K. *Held,* that the indictment was insufficient since it failed to allege that there was intent to injure the person assaulted. *People v. Stoyan* (1917) 280 Ill. 330, 117 N. E. 464.